87-797

No.

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CLERK

IN THE

Supreme Court of the United States

October Term, 1987

MARK POLLAK,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1987
(1626)

Questions Presented

1. Whether a probationer who commits criminal acts in violation of his probation terms and is thereafter prosecuted and convicted of a probation violation and re-sentenced therefor based upon the commission of the same criminal acts can thereafter be tried, convicted and sentenced under an indictment charging the commission of the same criminal acts, given the Fifth Amendment protection against former jeopardy and/or given the doctrines of res judicata and/or collateral estoppel under the Fourteenth Amendment?

2. Whether a New York State statute (New York Criminal Procedure Law, Section 40.30[1]) which limits offenses qualifying for double jeopardy protection to those prosecuted pursuant to a particular form of initiating document

(an "accusatory instrument") unconstitutionally restricts the Fifth Amendment protection against double jeopardy?

Parties

The petitioner is Mark Pollak, the named defendant in the Courts below.

The respondents are the People of the State of New York by Hon. Paul W. Elkan, Otsego County (New York) District Attorney, 197 Main Street, Courthouse, Cooperstown, New York. (607) 547-4249.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1987

- -X

MARK POLLAK

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK

Respondent.

- -X

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS.

Decision Below

The opinion of the New York State Supreme Court, Appellate Division, Third Judicial Department, presented in Appendix C hereto, is reported at 130 App. Div.2d 911, 516 NYS2d 511 (1987) and the denial of leave to further appeal by a

Judge of the New York State Court of Appeals is reported at ___NY2d___, ___NYS2d___ (1987).

Jurisdiction

The opinion of the New York State Supreme Court, Appellate Division, Third Judicial Department was rendered May 28, 1987 and that appeal was determined by that Court by order entered June 9, 1987; thereafter an application for leave to further appeal to the New York State Court of Appeals was presented to that Court on or about July 16, 1987, which application was denied by Hon. Richard D. Simons of that Court by certificate dated September 17, 1987.

This petition is filed within sixty (60) days of the said order denying leave to appeal to the New York State Court of Appeals.

The jurisdiction of this honorable Court to hear this petition and the proposed appeal is invoked under 28 USC 1257(3) since petitioner has throughout asserted substantial violations of his rights under the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. United States Constitution, Amendment V provides in pertinent part:

> "(N)or shall any person, be subject for the same offence to be twice put in jeopardy of life or limb."

2. United States Constitution, Amendment XIV provides in pertinent part:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. New York State statutory provisions, being somewhat voluminous, are presented in Appendix D hereto, to wit: New York Criminal Procedure Law, Sections 1.20(1), 1.20(18), 40.10(1), 40.30(1) and New York State Penal Law Section 10.00(1).

Statement of the Case

On October 19, 1984, petitioner was arrested and charged with having made separate unlawful drug sales on June 18, 1984 and June 26, 1984. The June 26, 1984 sale is the subject of this

petition; and presented herewith is a companion petition arising out of the June 18, 1984 sales.

At the time of petitioner's arrest on the subject drug charges petitioner was serving a sentence of five (5) years probation imposed as a result of the petitioner's plea of guilty to the Class E felony of Attempted Assault, 2nd Degree.

Following the drug sale arrest, probation violation proceedings were instituted.

The probation violation charges were presented in a Declaration of Delinquency which charged the petitioner as follows:

> "...That upon information and belief on or about 18 June 1984 and 26 June 1984, said defendant committed the crime of Criminal Sale of a Controlled Substance

> in the Third Degree, a Class B Felony.
>
> That upon information and belief on or about 26 June 1984 said defendant committed the crime of Criminal Sale of a Controlled Substance in the Fifth Degree, a Class D Felony ..."

The probation violation hearing was held on November 2, 1984 and at the conclusion of that hearing the Otsego County Judge made findings of fact and conclusions of law, finding petitioner guilty as charged of the drug sales on both occasions and as a result finding applicant guilty of probation violations.

Thereafter applicant was sentenced to one year in the Otsego County Correctional Facility upon the finding of probation violations.

In the meantime, on or about October 21, 1984, the October 1984 Otsego

County Grand Jury (Reconvened) returned two indictments against petitioner, Nos. 8 and 9, with number 9 underlying this petition and number 8 underlying the companion petition.

In August, 1985, the petitioner was tried under Indictment No. 9, the subject one.

Indictment No. 9 charged petitioner as follows:

> "The Grand Jury of the County of Otsego, by this indictment, accuse the defendant of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, a violation of Section 220.39(1) of the Penal Law of the State of New York, a Class B Felony, committed as follows: The said defendant, in the County of Otsego, on or about the 26th day of June, 1984, did knowingly and unlawfully sell a narcotic drug. At the aforesaid time and place, the defendant did sell a narcotic drug, to wit: oxycodone to

to an undercover police officer.

SECOND COUNT

And the Grand Jury aforesaid further accuse the defendant of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, committed as follows: The said defendant in the County of Otsego, on or about the 26th day of June, 1984, did knowingly and unlawfully sell a controlled substance. At the aforesaid time and place the defendant did sell a controlled substance, to wit: chloralhydrate, a depressant, to an undercover police officer." (Appendix F)

After the jury had been sworn and a prosecution witness had been sworn at the trial under Indictment No. 9, petitioner's counsel moved to dismiss the indictment on both federal and State double jeopardy and the related grounds,

procurring the admission of the relevant criminal complaints, the probation violation Declaration of Delinquency and the findings and conclusions of law made by the County Judge at the probation violation hearing as Court exhibits at the trial. (State Record on Appeal, Appellate Division, Appeal No. 51965, Vol. 1, pp. 99-100 and 47-59 - Appendix G) The motion was denied by the County Judge and that denial was thereafter affirmed by the Appellate Division and the Court of Appeals thereafter denied leave to appeal that affirmance.

Following the denial of the motion to dismiss, the trial proceeded and at the conclusion thereof petitioner was found guilty as charged.

Thereafter on September 9, 1985, petitioner was sentenced to 4½ to 9 years in State Prison (where he remains

to date) to run concurrently with the same sentence imposed earlier under Indictment No. 8.

The double jeopardy, res judicata and collateral estoppel defenses under both federal and State law were thereafter raised on appeal to the Appellate Division (See extracts from appellant's brief there - Appendix H and extracts from Appellant's Brief on the companion appeal there and the companion petition here - Appendix I) and after affirmance there, in the application for leave to appeal to the Court of Appeals (See extracts from letter-application, made to the Court of Appeals - Appendix J and letter-application made to the Court of Appeals in companion application there and the companion petition here - Appendix K).

Argument in Support of Granting Certiorari

It is well settled that the Fifth Amendment protection against being twice put in jeopardy for the same offense (hereinafter "double jeopardy") applies to the states. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed 2d 707 (1969) over-ruling Palko v. Connecticut, 302 U.S. 319, 5 S.Ct. 149, 82 L. Ed 288 (1937), as does the doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed 2d 469 (1970).

In Green v. United States, 355 U.S. 184, 200-1, 78 S.Ct. 221, 2 L.Ed 2d 199 (1957) this Court stated:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make

> repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (pp. 187-8; see also North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed 2d 656 [1969]).

This Court has also expressed concern:

> "[T]hat if the Government may prosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weakness of its own" United States v. DiFrancesco, 449 U.S. 117, at p. 128, 101 S.Ct. 426, 66 L.Ed 2d 328 (1980), on remand 658 F.2d 33.

The constitution or law of every state contain double jeopardy protection.

Although New York State's Constitution and statutory protections against double jeopardy are considered in some respects broader than the federal protection, e.g., the protection against prosecution by duel sovereigns (compare Bartkus v. Illinois, 359 U.S. 121, 151-2, 79 S.Ct. 676, 3 L.Ed 2d 684 [1959] with New York Criminal Procedure Law Article 40), petitioner submits that this case demonstrates that New York's protections are more restrictive than federal protection, e.g., where, as here, under New York law the protection is limited to only those prosecutions initiated by an "accusatory instrument" (New York Criminal Procedure Law, Section 40.30 [1]).

Indeed, in the only opinion rendered by any Court below, that of the Appellate Division, Third Department

(Appendix C hereto) this "accusatory instrument" disqualification was the sole ground for the holding that neither the federal nor New York State double jeopardy protections applied in favor of this petitioner.

That middle-level appeals court provided no other reasoning or precedent in support of its denial of protection.

Thus, the question is squarely raised here whether this New York State statute has unconstitutionally proscribed the federal Fifth Amendment protection against double jeopardy.

Neither the Fifth Amendment nor, it would appear, any decision of this Court limits the protection in terms of the nature or formal wording of the initiating prosecutorial instrument.

On the contrary, in Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed 2d

346 (1975), on remand 519 F.2d 1314, this Court held that a defendant could not be criminally tried for the same offense which had been the basis of a prior juvenile court adjudicatory hearing involving the same defendant.

Disapproved in Breed as well was the "label-of-convenience" (p. 529) which improperly disqualifies certain proceedings as triggering the federal double jeopardy protection.

Breed rather placed emphasis "in terms of potential consequences" (p. 530).

Here this petitioner faced a resentence of up to 1 1/3 to 4 years in state prison upon the probation violation conviction (See New York Penal Law, Sections 120.05, 110.05[6] and 70.00 [2][e] and 3[b]), and 12 ½ to 25 years in state prison upon the subsequent

indictment conviction. (See New York Penal Law, Section 220.39 and 70.06 [3][b] and [4][b]).

The prior probation violation hearing relevant here had the same attributes as the subsequent indictment trial (in the same Court and before the same Judge) except that by New York statute the probation violation hearing is conducted before the court without a jury (New York Criminal Procedure Law Section 410.70[3]) and the prosecution's burden of proof involves the lesser "preponderance of the evidence" standard (Ibid).

The question of whether the "same offense" is involved in the probation violation proceeding and in the indictment trial appears controlled by Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932), the issue being whether one proceeding

"requires proof of a fact which the other does not" (at p. 304). See also Brown v. Ohio, 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed 2d 187 (1977) and Iannelli v. United States, 420 U.S. 770, 785 N.17, 95 S.Ct. 1284, 43 L.Ed 2d 616 (1975).

Here the issue in each proceeding and the facts necessary to be proven in each proceeding were identical, namely whether the petitioner unlawfully sold the drugs.

The Appellate Division below dealt with the "issue" consideration not in terms of double jeopardy but in terms of collateral estoppel holding that collateral estoppel did not apply in that the issues were different, with the issue in the probation violation proceeding being whether petitioner violated his probation terms and the issue at the indict-

ment trial being whether petitioner committed the crimes charged.

Petitioner views this as a mere semantics, not unlike the "label-of-convenience" disapproved in Breed, supra, with the question of whether petitioner violated his probation terms or was guilty of a crime being not directly involved with the identical factual issues on trial in each proceeding but rather being mere conclusions to be drawn on the basis of the respective resolutions of those identical factual issues.

Since the forums (indeed the Judge) were the same in each proceeding and the factual issues tried were identical, petitioner submits that the doctrine of collateral estoppel is superfluous here -- double jeopardy being squarely the bar.

Similarly petitioner submits that the double jeopardy protection fully comprehends the protection afforded by the doctrine of res judicata.

Conclusion

Petitioner respectfully submits that it has been demonstrated here that the decisions of the New York Courts below, including the refusal by the New York State Court of Appeals, that State's highest Court, to hear petitioner's proposed appeal to that Court, is in conflict with the fundamental double jeopardy, res judicata and collateral estoppel protections of the Fifth Amendment to the United States Constitution as made binding upon the states through the Fourteenth Amendment to United States Constitution, and in conflict concomitantly with well settled decisions

of this honorable Court, such as Breed, supra and Blockburger, supra.

In the event that this Court should determine that the decisions below do not directly conflict with decisions of this Court, then petitioner respectfully submits that this petition and the appeal proposed by it raise important questions of federal law which have not been, but should be, settled by this Court.

As to other state courts of last resort and the federal courts of appeals, the apparent dearth of relevant decisions may be accounted for, petitioner respectfully suggests, by reluctance of these jurisdictions to engage in the type of double prosecution and double punishment present here, contenting themselves rather with the exercise of the

option whether to prosecute the probation violation or the crime per se.

As it stands, however, the New York decisions below affect not only this petitioner but all those similarly situated in the basically rural 28-County area of New York's Third Judicial Department, if not, in view of the denial of leave by the New York Court of Appeals, the entire State of New York.

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

John H. Owen
Counsel to Petitioner

APPENDIX A

(CERTIFICATE OF THE NEW YORK STATE COURT OF APPEALS)

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. RICHARD D. SIMONS,
Associate Judge

- -X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

MARK POLLAK,

Appellant.

Ind. No. 9 10/84

- -X

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Rome, New York

September 17, 1987

RICHARD D. SIMONS
Associate Judge

*Description of Order: Appeal from an order of the Appellate Division, Third Department, dated June 9, 1987 which affirmed a judgment of Otsego County Court, entered September 9, 1985.

APPENDIX B

(ORDER OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT)

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 20th day of April, 1987.

PRESENT: HON. ROBERT G. MAIN,
Justice Presiding
HON. JOHN T. CASEY
HON. ANN T. MIKOLL
HON. PAUL J. YESAWICH, JR.
HON. HOWARD A. LEVINE
Associate Justices

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

MARK POLLAK,

Appellant.

Index No. 51965

- -X

Mark Pollak, having appealed from a Judgment of conviction of the County Court, County of Otsego, rendered on the 9th day of September 1985, and said appeal having been presented during the above-stated term of this Court, and having been argued by John H. Owen, Esq. of counsel for the appellant, and by Linden D. Summers, III, Esq. of counsel for the respondent,

and after due deliberation, the Court having rendered a decision on the 28th day of May, 1987, it is hereby

ORDERED that the Judgment so appealed from be and hereby is affirmed and the matter remitted to county court.

ENTER:

/s/MICHAEL J. NOVACK
Clerk

DATED AND ENTERED: June 9, 1987.

A TRUE COPY

/s/MICHAEL J. NOVACK
Clerk

APPENDIX C

(DECISION OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT)

SUPREME COURT--APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

May 28, 1987 51965

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

MARK POLLAK,

Appellant.

MIKOLL, J.

Appeal from a judgment of the County Clerk of Otsego County (Mogavero, Jr., J.), rendered September 9, 1985, upon a verdict convicting defendant of the crimes of crim-

inal sale of a controlled substance in the third degree and criminal sale of a controlled substance in the fifth degree.

This appeal stems from defendant's conviction for selling six pills of oxycodone and 10 pills of chloralhydrate, both controlled substances, on June 26, 1984 to an undercover police officer. The arguments made by defendant as to double jeopardy and collateral estoppel were dealt with by us in People v Pollak (___ AD2d ___ [decided herewith]). We find no merit to these contentions.

At trial on this indictment (indictment No. 9), County Court permitted reference to defendant's alleged drug sale of June 18, 1984 (indictment No. 8). Defendant contends that this was error. County Court, relying on People v Rose

(84 AD2d 645, affd 57 NY2d 837), permitted such inquiry on the issue of intent. We concur with that ruling. Although reference to other drug sales was not permitted in the trial on indictment No. 8, the variant here is that in the first trial the record contains independent evidence of defendant's intent to commit the crime, while here there was no evidence to that effect. Thus, reference to the June 18, 1984 drug sale was properly permitted.

Defendant's contention that he was foreclosed from cross-examining the People's witnesses and thus denied a fair trial is also without merit. Defendant's attempt to impeach the missing witness/informant by cross-examining police witnesses about his extensive record was correctly disallowed. There is no right

to confrontation where a witness provides no evidence at trial. Further, the People were under no obligation to call this witness. We find no merit to the other issues raised by defendant.

Judgment affirmed.

MAIN, J.P., CASEY, MIKOLL, YESAWICH, JR., and LEVINE, JJ., concur.

APPENDIX D

(DECISION OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, REFERRED TO IN APPENDIX C, SUPRA)

SUPREME COURT--APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

May 28, 1987 50163

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

MARK POLLAK,

Appellant.

MIKOLL, J.

Appeal from a judgment of the County Court of Otsego County (Mogavero, Jr., J.), rendered April 22, 1985, upon a verdict convicting defendant of the crime of crim-

inal sale of a controlled substance in the third degree.

Defendant challenges his conviction on several grounds. He contends that double jeopardy and/or collateral estoppel considerations for close his prosecution for the instant crime; that County Court erred in its Sandoval ruling; that adverse publicity deprived him of a fair trial; that County Court's instructions to the jury were inadequate and prejudicial to him; and that defendant was improperly sentenced as a second felony offender.

The present appeal stems from defendant's indictment (hereinafter indictment No. 8) and conviction for selling oxycodone, a controlled substance, to an undercover police officer on June 18, 1984. Defendant was indicted for

this sale and also, in a separate indictment (hereinafter indictment No. 9), for crimes stemming from a subsequent sale to the same officer which took place on June 26, 1984 (see, People v. Pollak, ___ AD2d ___ [decided herewith]). Defendant was found guilty of the June 18, 1984 sale and was sentenced as a second felony offender. This appeal relates to defendant's conviction under indictment No. 8.

Prior to the return of indictment Nos. 8 and 9, defendant was charged with violating the terms of his probation stemming from his conviction upon a plea of guilty to the crime of attempted assault in the second degree, a class E felony. The declaration of delinquency alleged that defendant had sold controlled substances on June 18, 1984 and

June 26, 1984 to a police officer, thus breaching the condition of probation that he not violate any local, State or Federal law. Following a hearing, defendant was found to have made the sales and was found to be in violation of the terms of his probation. He was then resentenced on the attempted assault conviction to one year in the Otsego County Jail. Defendant contends that the probation violation proceeding placed him in jeopardy.

We find defendant's double jeopardy/collateral estoppel arguments without merit. The violation of probation proceeding did not constitute a prosecution within the meaning of CPL 40.20 (1), which states that, "A person may not be twice prosecuted for the

same offense." The prosecution of an offense requires the filing of an accusatory instrument in a court of this State or any jurisdiction within the United States (CPL 40.30 [1]; see, People v Santana, 99 AD2d 586, 587). The declaration of delinquency filed against defendant which required his presence in court was not in the nature of an accusatory instrument and thus the proceedings attendant upon it did not place defendant in jeopardy as contemplated by CPL 40.20 (1). Accordingly, defendant's claim of double jeopardy fails.

Defendant's collateral estoppel argument is also without merit. The issue resolved in defendant's violation of probation proceeding differed from the issue underlying the criminal charges of indictment No. 8. The former referred to

the question of whether defendant violated the conditions placed upon him during probation. The trial, on the other hand, related to whether defendant committed a crime.

We also find no merit as to defendant's allegations of error based on County Court's Sandoval ruling. Defendant contends that his prior conviction for attempted assault in the second degree was based on an unintentional, spontaneous act and should not have been used to impeach his credibility. We find that County Court did not abuse its discretion. The record contains support that the act was intentional.

Defendant next contends that a newspaper article describing the trial, which appeared on the day the case was

submitted to the jury and in which reference was made to the drug sale of June 26, 1984, was prejudicial and in violation of strictures placed on counsel not to discuss the case. The District Attorney was quoted as the source of the article. We disagree. There is no indication that the jurors failed to follow County Court's instruction not to read accounts of the trial.

We also find no error in County Court's instructions to the jury in response to their request for the reading of certain testimony. We note that defendant did not object to the instructions and thus did not preserve any error for review on appeal.

Defendant's contention that he was improperly sentenced as a second felony offender is also unavailing. This con-

tention was premised first on ineffective assistance of counsel, which we find meritless, and, second, on the contention that Penal Law § 120.05 (2) is unconstitutionally vague. This issue was resolved by People v. Cwikla (46 NY2d 434, 442).

Judgment affirmed.

MAIN, J.P., CASEY, MIKOLL, YESAWICH, JR., and LEVINE, JJ., concur.

APPENDIX E

(NEW YORK STATE STATUTORY PROVISIONS)

1. New York State Criminal Procedure Law:

   a) Section 1.20(1):

> "'Accusatory instrument' means an indictment, an information, a simplified information, a prosecutor's information, a superior court information, a misdemeanor complaint or a felony complaint. Every accusatory instrument, regardless of the person designated therein as accusor, constitues an accusation on behalf of the state as plaintiff and must be entitled 'the people of the state of New York' against a

designated person, known as the defendant."

b) Section 1.20(18):

"'Criminal proceeding' means any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this state or of any other jurisdiction, or involves a criminal investigation."

c) Section 40.10(1):

"'Offense.' An 'offense' is committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction

BEST AVAILAB

violates two or more such statutory provisions each such violation constitutes a separate and distinct offense. The same conduct or criminal transaction also establishes separate and distinct offenses when, though violating only one statutory provision, it results in death, injury, loss or other consequences to two or more victims, and such result is an element of the offense as defined. In such case, as many offenses are committed as there are victims."

d) Section 40.30(1):

"Except as otherwise provided in this section, a person 'is prosecuted' for an offense, within the meaning of section 40.20, when he is charged therewith by

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EDITOR'S NOTE

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an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

a) Terminates in a conviction upon a plea of guilty; or

b) Proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.

2. New York Penal Law:

a) Section 10.00(1);

"'Offense' means conduct for which a sentence to a term of imprisonment or to a fine is

provided by any law of this state or by any law, local law, or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same."

APPENDIX F

(INDICTMENT, STATE RECORD ON APPEAL, APPELLATE DIVISION APPEAL NO. 51965, VOL. 1 COVER AND pp. 5 AND 5A)

STATE OF NEW YORK

APPELLATE DIVISION--THIRD DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MARK POLLAK,

Defendant/Appellant.

Indictment No. 9
(10/84.,9/9/85 Conviction)

- -X

RECORD ON APPEAL

VOLUME ONE OF TWO

RICHARD A. ROTHERMEL, ESQUIRE
Otsego County Public Defender
Attorney for Defendant-
Appellant
Office and Post Office Address
18 Market Street
Oneonta, New York 13820
(607) 432-7410

TO: PAUL W. ELKAN, ESQUIRE
Otsego County District Attorney
Attorney for Respondent
P.O. Box 207 - 50 Main Street
Cooperstown, New York 13326-0207
(607) 547-8205

SUPREME COURT

COUNTY OF OTSEGO

- -X

THE PEOPLE OF THE STATE OF NEW YORK

against

MARK POLLOCK

Indictment No. 9
10/84 Grand Jury (reconvened)

- -X

The Grand Jury of the County of Otsego, by this indictment, accuse the defendant of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, in violation of Section 220.39 (1) of the Penal Law of the State of New York, a Class B Felony, Committed as follows:

The said defendant, in the County of Otsego, on or about the 26th day of June, 1984, did, knowingly and unlawfully sell a narcotic drug. At the

aforesaid time and place, the defendant did sell a narcotic drug, to wit: oxycodone to an undercover police officer.

SECOND COUNT

And the Grand Jury aforesaid further accuse the defendant of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, committed as follows: The said defendant in the County of Otsego, on or about the 26th day of June, 1984, did knowingly and unlawfully sell a controlled substance. At the aforesaid time and place the defendant did sell a controlled substance, to wit: chloralhydrate, a depressant, to an undercover police officer.

PAUL W. ELKAN,
Otsego County District
Attorney

Foreman (acting)
Indictment No. 9
Filed: _____

SUPREME COURT

OTSEGO COUNTY

THE PEOPLE

against

MARK POLLOCK

INDICTMENT
FOR
CRIM. SALE OF A CONTROLLED SUB., 3rd
CRIM. SALE OF A CONTROLLED SUB., 5th

PAUL W. ELKAN
District Attorney

A TRUE BILL

.....Foreman

Filed October 31, 1984

Arraigned November 9th, 1984

Pleaded NOT guilty.

Bail fixed at $.....

Counsel John Owen retained

Trial Aug 20th-26th, 1985 and

Guilty as charged on both counts

Sentence 9-9-85: Sent. as a 2nd felony offender to an Indeterminate Term of not more than 9 yrs. and not less than 4½ yrs. to run concurrent at the Wende Correctional Facility, Alden, New York and a $75.00 surcharge

FILED: OCT 31 1984
OTSEGO COUNTY CLERK'S
OFFICE

APPENDIX G

(STATE RECORD ON APPEAL, APPELLATE DIVISION, APPEAL NO. 51965, VOL. 1, COVER TRIAL TRANSCRIPT COVER, pp. 99-100 AND 47-59)

STATE OF NEW YORK

APPELLATE DIVISION--THIRD DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MARK POLLAK,

Defendant/Appellant.

Indictment No. 9
(10/84., 9/9/85 Conviction)

- -X

RECORD ON APPEAL

VOLUME ONE OF TWO

RICHARD A. ROTHERMEL, ESQUIRE
Otsego County Public Defender
Attorney for Defendant-
Appellant
Office and Post Office Address
18 Market Street
Oneonta, New York 13820
(607) 432-7410

TO: PAUL W. ELKAN, ESQUIRE
Otsego County District Attorney
Attorney for Respondent
P.O. Box 207 - 50 Main Street
Cooperstown, New York 13326-0207
(607) 547-8205

STATE OF NEW YORK

COUNTY COURT COUNTY OF OTSEGO

- -X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MARK POLLAK
Defendant

Indictment No. 9
(10/84 GJ)

- -X

At a Term of County Court held in and for the County of Otsego at the Courthouse, Cooperstown, N.Y. Trial held AUGUST 20 through 26, 1985.

Honorable Joseph A. Mogavero, Jr.,
County Judge, Presiding

Appearances: Defendant Mr. Mark Pollak
and by John Owen, Esq.
(Box 325, Cooperstown)

District Attorney,
Paul Elkan, Esq.

Deputy Clerk,
Ms. Georgia Cantwell

Defendant's parents,
Mr. & Ms. Pollak

T R I A L

(The Court)

use the same parking lots. When you come in tomorrow you may bump into the jurors. Don't talk to them or about the case where the jurors might hear the conversation. Likewise, in the streets and halls you may bump into one another. You jurors are excused. I wish you would please go home. See you tomorrow morning at 9:00.

(AUGUST 21st, 9:00 AM) THE COURT: Note the fact the trial jurors are out in the jury room. Note all the appearances.

(Appearances today: Defendant and by Atty. Owen, accompanied by defendant's mother and father and Sheriff's deputy; D.A. P. Elkan and Deputy Court Clerk, Ms. G. Cantwell)

DEFENSE ATTY. OWEN: I would like to check the Court Clerk's record to

determine whether this jury was sworn.

THE COURT: As each juror was selected they were sworn; I recall they were sworn.

DEFENSE ATTY. OWEN: But, isn't the whole jury sworn after they're selected?

THE COURT: Oh, no, no.

DEFENSE ATTY. OWEN: In that case, I move to dismiss the indictment on the grounds of former jeopardy, collateral estoppel and res judicata. More specifically, that this defendant was tried and convicted of the exact offense charged in the indictment in a probation violation hearing presided over by Your Honor. And, in support of this motion I would offer in evidence certain court documents..

THE COURT: Consisting of what, Mr. Owen?

DEFENSE ATTY. OWEN: The criminal court complaints, which separately charge the two counts contained in the indictment on trial here; the Declaration of Probation Delinquency which charges the (100) defendant with commiting the same crimes as set forth in the first criminal complaint, your Honor's findings of fact in the probation violation proceeding, finding the defendant guilty of those same two crimes, and a copy of the indictment on trial here charging those same two crimes.

THE COURT: Have all of those documents marked as Exhibit "AA" so as not to confuse them with the other exhibits. Anything further?

ATTY. OWEN: Not in connection with that particular motion.

THE COURT: Mr. Elkan?

DISTR.ATTY: The law in the case, in

accordance with Judge Crew in this instance, on appeal...those cases have been dismissed by the Supreme Court in an action collateral with this.

THE COURT: In response to Mr. Owen's motion, the Court will be filing with the Clerk of the Court the Respondent Mogavero's brief, on file with the Appellate Division, Third Department, which answers Mr. Owen's claim and sites the authority. Therefore, based thereon, the motion is denied.

Next, Mr. Owen?

ATTY.OWEN: I would note there's been a change in the witness list at the request of the State Police; namely, Investigator Alfred Smith has been substituted with respect to the subpoena served upon Senior Investigator David McElligott, and that's with the agreement of the District Attorney's Office and for the convenience

of Senior Investigator McElligott, who's on vacation at this time, and it was agreed in this notice that the People would not object that Investigator Smith has not been on the witness list.

(47) COMPLAINT

STATE OF NEW YORK

COUNTY OF OTSEGO

CITY COURT, CITY OF ONEONTA

- X

THE PEOPLE OF THE STATE OF NEW YORK

-vs.-

MARK POLLAK
51 Chestnut Street
Oneonta, New York

Defendant

- X

ACCUSATION

BE IT KNOWN THAT, by this Complaint Trooper R.E. CHARLES as the Complainant herein, stationed at Binghamton, New York accuses MARK POLLAK the above mentioned Defendant, with having committed the felony of Criminal Sale of a Controlled Substance 3rd Degree in violation of Section 220.39 Subdivision 1. of the

Penal Law of the State of New York.

That on or about the 18th day of June, 1984, at about 5:45 p.m. in the City of Oneonta, County of Otsego, Defendant did knowingly, and unlawfully, sell a narcotic drug: TO WIT: The defendant did while at his residence located at 51 Chestnut Street, in the City of Oneonta - Otsego County sell to your deponent, a police officer acting in an undercover capacity a quantity of PERCODAN, a narcotic drug, for the purchase price of $20.00 cash, all being in violation of the aforementioned statute of law, made and provided, and against the people of the State of New York.

FACTS

A violation of this statute of law shall constitute a Class 'B' Felony crime.

The above allegations of fact are made by the Complainant herein on direct knowledge.

WHEREFORE, Complainant prays that a Warrant be issued for the arrest of the said Defendant.

NOTICE

In a written instrument, any person who knowingly makes a false statement which such person does not believe to be has committed a crime under the laws of the State of New York punishable as a Class A Misdemeanor. (PL §210.45)

Affirmed under penalty of perjury
this 16 day of October, 1984.

TPR. R.E. CHARLES
Complainant

(48) EXHIBIT B

(49) COMPLAINT

STATE OF NEW YORK

COUNTY OF OTSEGO

CITY COURT, CITY OF ONEONTA

- -X

THE PEOPLE OF THE STATE OF NEW YORK

-vs.-

MARK POLLAK
51 Chestnut Street
Oneonta, New York

Defendant

- -X

ACCUSATION

BE IT KNOWN THAT, by this Complaint Trooper R.E. CHARLES as the Complainant herein, stationed at Binghamton, New York accuses MARK POLLAK the above mentioned Defendant, with having committed the felony of Criminal Sale of a Controlled Substance 3rd, in violation of Section 220.39 Subdivision 1. of the Penal

Law of the State of New York.

That on or about the 26th day of June, 1984, at about 12:34 PM in City of Oneonta, County of Otsego, Defendant did knowingly, and unlawfully, sell a narcotic drug: TO WIT: The defendant did while at his residence located at 51 Chestnut St., City of Oneonta, New York - Otsego County, sell to your deponent, a police officer acting in an undercover capacity, a Quantity of PERCODAN, a Narcotic drug, for a purchase price of $12.00 cash, all in violation of the aforementioned statute of law, made and provided, and against the people of the State of New York.

FACTS

A violation of this statute of law shall constitute a Class 'B' Felony.

The above allegations of fact are

made by the Complainant herein on direct knowledge.

WHEREFORE, Complainant prays that a Warrant be issued for the arrest of the said Defendant.

NOTICE

In a written instrument, any person who knowingly makes a false statement which such person does not believe to has committed a crime under the law of the State of New York punishable as a Class A Misdemeanor. (PL §210.45)

Affirmed under penalty of perjury this 16 day of October, 1984.

TPR. R. E. CHARLES
Complainant

(50) COMPLAINT

STATE OF NEW YORK

COUNTY OF OTSEGO

CITY COURT, CITY OF ONEONTA

- -X

THE PEOPLE OF THE STATE OF NEW YORK

-vs.-

MARK POLLAK
51 Chestnut Street
Oneonta, New York

Defendant

- -X

ACCUSATION

BE IT KNOWN THAT, by this Complaint, Trooper R.E. CHARLES as the Complainant herein, residing at Binghamton, New York accuses MARK POLLAK the above mentioned Defendant, with having committed the felony of Criminal Sale of a Controlled Substance 5th Degree in violation of Section 220.31 of the Penal Law of the State of New York.

That on or about the 26th day of June, 1984, at about 12:34 p.m. in City of Oneonta, County of Otsego, Defendant did knowingly, and unlawfully, sell a Controlled Substance: TO WIT: The defendant did while at his residence located at 51 Chestnut Street in the City of Oneonta - Otsego County, sell to your deponent, a police officer acting in an undercover capacity, a quantity of CLORAL HYDRATE, a controlled substance, for a purchase price of $30.00 cash, all being in violation of the aforementioned statute of law, made and provided, and against the people of The State of New York.

FACTS

A violation of this statute of law shall constitute a Class 'D' Felony crime.

The above allegations of fact are made by the Complainant herein on direct knowledge.

WHEREFORE, Complainant prays that a Warrant be issued for the arrest of the said Defendant.

NOTICE

In a written instrument, any person who knowingly makes a false statement which such person does not believe to has committed a crime under the laws of the State of New York punishable as a Class A Misdemeanor. (PL §210.45).

Affirmed under penalty of perjury
this 16 day of October, 1984.

TPR. R.E. CHARLES
Complainant

(51) EXHIBIT C

(52) DECLARATION OF DELINQUENCY

STATE OF NEW YORK

COUNTY COURT COUNTY OF OTSEGO

- -X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MARK R. POLLAK,

Defendant

- -X

STATE OF NEW YORK)
SS: LINDA HERRMANN
COUNTY OF OTSEGO)

LINDA HERRMANN, being duly sworn, deposes and says the following:

1. That I am a Probation Officer in and for the County of Otsego and my official address is County Office Building, Cooperstown, New York.

2. That on 4 March 1983 said defendant was convicted of Attempted

Assault in the Second Degree, Class E Violent Felony.

3. That on 25 April 1983 said defendant was sentenced to four years and eleven months probation.

4. That among the conditions imposed by the Court was that said defendant not violate any Federal, State or local law.

5. That upon information and belief on or about 18 June 1984 and 26 June 1984, said defendant committed the crime of Criminal Sale of a Controlled Substance in the Third Degree, a Class B Felony.

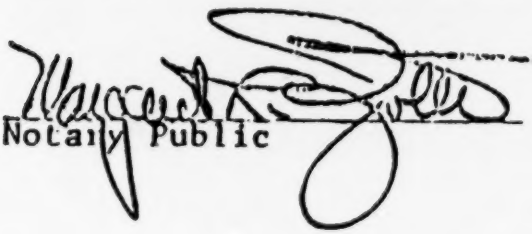
6. That upon information and belief on or about 26 June 1984 said defendant committed the crime of Criminal Sale of a Controlled Substance in the Fifth Degree, a Class D Felony.

(53) WHEREFORE, your deponent requests that said defendant be brought back before

this Court to answer a charge of violating the conditions of his probation and be dealt with according to law.

LINDA HERRMANN
Probation Officer

Sworn to before me this
24th day of October, 1984.



Notary Public

(54) EXHIBIT D

STATE OF NEW YORK

COUNTY COURT COUNTY OF OTSEGO

- X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

MARK POLLAK

Indictment No. 3
(10-83 Reconvened Grand Jury)

- X

At a Special Term of County Court held in and for the County of Otsego at the Family Court Hearing Room in the County Office Building, Village of Cooperstown, New York on the 2nd day of November, 1984.

HON. JOSEPH A. MOGAVERO, OTSEGO COUNTY JUDGE, PRESIDING.

APPEARANCES: Paul W. Elkan, District Attorney

Defendant in Person and his father

John H. Owen, Attorney for Defendant (Ret'd)

Gloria Holder, Dep. Court Clerk

CHARGE: ATTEMPTED ASSAULT IN THE SECOND DEGREE

(HEARING)

(55)

THE COURT: The Court makes the following findings:

That on June 18, 1984 Ricky E. Charles at the place where the defendant was residing purchased from the defendant the ten pills that he testified to that he purchased for $2.00 apiece. When I say purchased, I mean that the defendant sold or exchanged those pills to witness Charles for the amount of money that

he gave him, which I believe was $20.00; that what in effect was received by Charles and which was delivered to him by the defendant was in fact a narcotic drug as testified to by the last witness which I believe was this oxycodone which, according to the law, is a narcotic drug as defined in the Public Health Law and which is unlawful to possess or sell. You can possess it provided you have got a legal prescription therefor but it is not lawful to sell unless you have got a license to do so.

Further, the Court finds the defendant knew what he sold was this narcotic drug and he had no license to sell it.

The Court accepts the testimony of the witnesses produced by the

People in connection with the transaction as testified to by witness Charles (56) and also accepts the proof that was submitted in connection with the chain of evidence from the receipt thereof to the chemical lab and from the chemical lab back into possession of the police to be presented again here today.

The Court finds in fact the substance was purchased was the same substance analyzed; nothing happened to the substance and it was one and the same.

In connection with the transaction that occurred again on the 23rd, the Court finds that again the items that were purchased by the witness Charles were in fact purchased from the defendant in that in

exchange for money the defendant did transfer or exchange those items to Charles; that in fact the stuff that was transferred over and sold to Charles were narcotic drugs as defined by the Public Health Law. That the Court accepts the testimony of the analyst in connection with the previous transaction that the items that were purchased were in fact the items the analyst testified to were narcotic drugs that were prohibited to be sold unless you have a license to do so; that the items were the same items purchased; that nothing happened to them, (57) they were not contaminated; they were delivered intact to the police, to the lab and remained intact where the lab analyst performed the test thereon and the facts the

witness testified to that they were in fact drugs that he identified; that this defendant knew when he sold these drugs to Charles that they were narcotic drugs and that he had no right to sell them and it was unlawful to do so and in sum and substance, based upon the evidence and proof that has been presented, the Court is satisfied beyond any doubt that the defendant violated state law. He committed crimes and, as a result, has violated the orders and conditions of probation.

I am cancelling his bail. I am setting aside the previous sentence that was imposed in connection with this charge and am remanding him to the custody of the Sheriff. I am asking the Probation Department

to prepare an up-date for the purpose of re-sentencing. How much time do you need?

MRS. HERMANN: A week should be sufficient.

THE COURT: Could you do it by Friday, the 9th?

MRS. HERMANN: Yes.

THE COURT: We will resentence him at 9 o'clock Friday, the 9th. The up-date should be made available

(58) hopefully by November 7th. Election Day is Tuesday the 6th. Once it has been prepared and submitted to me, you are entitled to examine it, Mr. Owen, and you will be allowed to examine it and make any copy of it, if you want to, prior to sentencing on the 9th.

You have a couple of indictments against this individual.

We can arraign him on those indictments on the 9th at the same time.

MR. ELKAN: What do you want to do with the exhibits that have been received?

THE COURT: The Clerk will take them into her possession.

MR. OWEN: You Honor, may I be heard about cancelling defendant's bail?

THE COURT: He has no right to bail. He has been convicted. He was on probation. I have now vacated that sentence I imposed. He has no right, as a matter of law, to have bail fixed.

MR. OWEN: He has made all his appearances; he lives with his family. He knows what he has been facing and, despite that, made all his appearances in the City Court and here today. He should have an

opportunity to put his affairs in order if I am correct in what your Honor has in mind.

(59) THE COURT: Bail is cancelled. He is remanded to the custody of the Sheriff without bail.

* * * * * * *

APPENDIX H

(APPELLANT'S BRIEF, APPELLATE DIVISION, APPEAL NO. 51965, COVER AND pp. i, 1 AND 4)

STATE OF NEW YORK

APPELLATE DIVISION--THIRD DEPARTMENT

- X

PEOPLE OF THE STATE OF NEW YORK

against

MARK POLLAK,

Appellant.

Appeal No. 51965
(Indictment No. 9, 10/84
Reconvened Otsego County Grand Jury)

- X

APPELLANT'S BRIEF

John H. Owen,
Counsel to Appellant
Key Bank Building
P.O. Box 325
Cooperstown, NY 13326
(607) 547-8721

STATE OF NEW YORK

APPELLATE DIVISION--THIRD DEPARTMENT

- -X

PEOPLE OF THE STATE OF NEW YORK

against

MARK POLLAK

Appellant.

Appeal No. 51965
(Indictment No. 9, 10/84
Reconvened, Otsego County Grand Jury)

- -X

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STATE OF NEW YORK

APPELLATE DIVISION--THIRD DEPARTMENT

- -X

PEOPLE OF THE STATE OF NEW YORK

against

MARK POLLAK,

Appellant.

- -X

APPELLANT'S BRIEF

INTRODUCTION

Appellant, Mark Pollak, appeals to this Court from the judgment of conviction and sentence entered September 9, 1985, in the Otsego County Court (Mogavero, J.) convicting the appellant of Criminal Sale of a Controlled Substance, 3rd Degree (Penal Law Section 220.39(1), a Class B felony, and Criminal Sale of a Controlled Substance, 5th Degree (Penal Law Section 220.31), a

Class D felony and sentencing the appellant to 4 ½ to 9 years in State prison, as a second felony offender.

QUESTIONS PRESENTED

1. Whether, given the fact that appellant was tried and convicted in a prior probation violation hearing for the exact same acts and charges as presented in the subject indictment, the later prosecution of the subject indictment was barred by principles of former jeopardy, collateral estoppel and/or res judicata.

Answer below: No

questions of that adverse witness, dealt with at Point V, infra; the Court below in its charge prejudicially overemphasized, in connection with the entrapment defense issue, the question of whether

the appellant committed the crime and deemphasized the other major question of whether the appellant was entrapped into committing the crime, dealt with at Point VI, infra.

ARGUMENT

POINT I: THE PRINCIPLES OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL AND/OR RES JUDICATA BARRED PROSECUTION OF THE SUBJECT INDICTMENT.

The issues under this Point are identical with those under the same Point in Appellant's Brief (p. 7 et. seq.) on the companion appeal.

The motion to dismiss appears in this record at 99-100 (See also 94 and 107) and the exhibits submitted in support of the motion appear at 287-298 (See also 116)

POINT II: THE PRE-TRIAL SANDAVOL RULING WAS ERRONEOUS AND PREJUDICIAL

The Sandavol ruling from which exception is taken in both pending appeals applied in the same terms to the trials under both indictments (85-89).

Appellant has dealt with the Sandavol issue in the same Point in Appellant's Brief (p. 21 et. seq.) on the companion appeal.

APPENDIX I

(APPELLANT'S BRIEF, APPELLATE DIVISION APPEAL NO. 50163 REFERRED TO IN APPENDIX H, Supra, COVER AND pp. i, 7-8)

STATE OF NEW YORK

APPELLATE DIVISION--THIRD DEPARTMENT

- X

PEOPLE OF THE STATE OF NEW YORK

against

MARK POLLAK,

Appellant.

Appeal No. 50163
(Indictment No. 8, 10/84
Reconvened Otsego County Grand Jury)

- X

APPELLANT'S BRIEF

John H. Owen
Counsel to Appellant
Key Bank Building
P.O. Box 325
Cooperstown, New York
13326
(607) 547-8721

STATE OF NEW YORK

APPELLATE DIVISION--THIRD DEPARTMENT

- -X

PEOPLE OF THE STATE OF NEW YORK

against

MARK POLLAK,

Appellant.

Appeal No. 50163
(Indictment No. 8, 10/84
Reconvened Otsego County Grand Jury)

- -X

APPELLANT'S BRIEF

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POINT IV:	THE COURT BELOW DEALT IMPROPERLY WITH A QUESTION FROM THE JURY	28
POINT V:	THE SECOND FELONY CHARGE SHOULD HAVE BEEN DISMISSED IN THAT APPELLANT'S CON	

(7)

Thereafter appellant was accused of being a second felony offender.

At the second felony hearing appellant contested the competance of counsel who represented him when entering a plea to the Attempted Assault, Second Degree charge and that assault statute as vague (Point V, infra).

At the conclusion of the second felony hearing, the Court below found that the appellant was the subject of a constitutionally entered prior felony conviction of Attempted Assault, Second Degree.

Thereafter in April, 1985, the appellant was sentenced to 4 ½ to 9 years in State Prison as a second felony offender (3; 662).

ARGUMENT

POINT I: THE PRINCIPLES OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL AND/OR RES JUDICATA BARRED PROSECUTION OF THE SUBJECT INDICTMENT.

Since the issue of whether the prosecution of the indictments were barred was first raised (in the Article 78 proceeding previously referred to), respondent has conceded that the acts and charges of which the appellant was found guilty in the probation violation proceeding are totally identical with the acts and charges represented by the two indictments.

A. Double Jeopardy

This appeal, then, involves one of the most fundamental and basic constitutional provisions, invoked at the very

founding of this Nation, the right of its citizens against being twice put in jeopardy for the same offense. Involved here is nothing less than the Fifth Amendment to the United States Constitution itself and Article 1, Section 6 of the New York State Constitution, each imminently superior to Article 40 of the New York State Criminal Procedure Law, also to be referred to; involved as well are the fundamental, related doctrines of res judicata and collateral estoppel.

In the light of the principle that constitutional rights are to be liberally construed in favor of the citizens of this Country, for whose benefit they were installed in the most fundamental law of the land, it is seen overall here that for the precise same acts (of allegedly selling controlled substances

on two occasions) this appellant has already been brought before a criminal court, where he was charged, tried, found guilty and sentenced to incarceration as and for a probation violation, and now has been put on trial, convicted and sentenced in the same criminal court under one of the Indictments representing one of the two alleged drug transactions embraced within the probation violation conviction (the subject indictment) and has been tried, convicted and sentenced under the other indictment representing the other alleged drug transaction embraced within the probation violation conviction (the companion appeal).

Respondents, in the CPLR Article 78 proceeding, focused

APPENDIX J

(LETTER-APPLICATION TO COURT OF APPEALS SEEKING LEAVE TO APPEAL, pp. 1-3)

JOHN H. OWEN
Attorney and Counsellor at Law
P.O. Box 325
Cooperstown, N.Y. 13326

Phone: 607-547-8721
Also a Member of the
District of Columbia Bar

Suite 210
Key Bank Building
101 Main Street

July 15, 1987

CERTIFIED MAIL - RRR

Hon. Sol Wachtler
Chief Judge
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

ATT: Hon. Donald M. Sheraw
Clerk of the Court

Re: People v. Mark Pollak
Appellate Division: Third Department
Appeal No. 51965

Dear Judge Wachtler:

This is an application pursuant to Section 460.20 of the Criminal Procedure Law on behalf of Mark Pollak (hereinafter

"applicant"), seeking leave to appeal to this Court from the order of the Appellate Division, Third Department, entered June 9, 1987 unanimously affirming applicant's convictions of Criminal Sale of a Controlled Substance, 3rd Degree (P.L. 220.39) and Criminal Sale of a Controlled Substance, 5th Degree (P.L. 220.31) and his sentence of 4 ½ to 9 years imprisonment as a second felony offender.

Presented herewith are copies of the following documents:

1. Order of the Appellate Division, Third Department referred to above.
2. Opinion of the Appellate Division, Third Department, dated May 28, 1987.
3. The briefs at the Appellate Division, that is, Appellant's Brief, Respondent's Brief and Appellant's Reply Brief.

The order of the Appellate Division with notice of its entry was served personally upon the undersigned on June 24, 1987.

No application for leave to appeal the aforesaid Appellate Division order has been made to the Appellate Division nor to any Justice thereof.

Jurisdiction of the Court

The jurisdiction of this Court to grant leave to appeal herein and to determine the appeal is founded upon New York State Constitution Article 6,

Section 3(b) and Section 450.90 of the Criminal Procedure Law.

Statement of Facts

On October 19, 1984, applicant was arrested and charged with having made separate unlawful drug sales on June 18, 1984 and June 26, 1984. The June 26, 1984 sale is the subject of this application; and presented herewith is a companion application arising out of the June 18, 1984 sales (Appellate Division, Third Department, Appeal No. 50163).

There are at least three issues sought to be ruled upon by this Court which are substantially common in factual basis and legal effect to both of the instant 460.20 applications, to wit: 1. Double jeopardy, collateral estoppel and/or res judicata, 2) Sandavol ruling and 3) Unconstitutionally procurred predicate felony conviction utilized for enhancement of the sentence in connection with this as well as the companion application, with the contention being ineffective assistance of counsel and unconstitutional statute underlying the predicate conviction. There are several other issues peculiar to each of the two instant applications.

The common issues are presented more fully in the companion application (which concerns the June 18, 1984 sale) and will be dealt with here largely by incorporation of and reference back to the relevant portions of the companion application, with issues peculiar to this application being presented more fully here.

The facts concerning the applicant being on probation at the time of his subject arrest, the probation violation proceedings, the return of the two indictments, one concerning the June 18 sale (the companion application) and the other concerning the June 26 sale (the instant application), the Article 78 proceeding seeking to restrain the prosecution of both indictments upon the grounds of double jeopardy, collateral estoppel and/or res judicata, are applicable here and are as set forth in the statement of facts in the companion application.

After having been convicted of the June 18, 1984 drug sale under the first indictment and sentenced to 4 ½ to 9 years in State prison as a second felony offender, applicant was in August, 1985 tried under the second indictment concerning the June 26, 1984 sales.

POINT I: THE PRINCIPLES OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL AND/OR RES JUDICATA BARRED PROSECUTION OF THE SUBJECT INDICTMENT

At the appropriate time in the second trial, applicant's counsel made a motion to dismiss on the ground of double jeopardy, collateral estoppel and/or res judicata (as he had done in the first trial) and submitted appropriate documents marked as Court exhibits such as the probation violation Declaration of Delinquency, the criminal complaints and

the findings of fact and conclusions of law in the probation violation proceeding.

The motion was denied and the trial proceeded.

The issues under this Point are otherwise identical with those under the same Point in the companion appeal.

POINT II: THE PRE-TRIAL SANDAVOL RULING WAS ERRONEOUS AND PREJUDICIAL.

In the second trial, the Sandavol ruling was exactly the same ruling as was made prior to the first trial and applicable to the first trial and

APPENDIX K

(LETTER-APPLICATION TO COURT OF APPEALS SEEKING LEAVE TO APPEAL, REFERRED TO IN APPENDIX J, Supra, pp. 1 and 5)

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July 15, 1987

CERTIFIED MAIL - RRR

Hon. Sol Wachtler
Chief Judge
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

ATT: Hon. Donald M. Sheraw
Clerk of the Court

Re: People v. Mark Pollak
Appellate Division, Third Department
Appeal No. 50163

Dear Judge Wachtler:

This is an application pursuant to Section 460.20 of the Criminal Procedure

Law on behalf of Mark Pollak (hereinafter "applicant"), seeking leave to appeal to this Court from the order of the Appellate Division, Third Department, entered June 9, 1987, unanimously affirming applicant's conviction of Criminal Sale of a Controlled Substance, 3rd Degree (P.L. 220.39) and his sentence of 4 ½ to 9 years imprisonment as a second felony offender.

Presented herewith are copies of the following documents:

1. Order of the Appellate Division, Third Department referred to above.
2. Opinion of the Appellate Division, Third Department, dated May 28, 1987.
3. The briefs at the Appellate Division, that is, Appellant's Brief, Respondent's Brief and Appellant's Reply Brief.

The order of the Appellate Division with notice of its entry was served personally upon the undersigned on June 24, 1987.

No application for leave to appeal the aforesaid Appellate Division order has been made to the Appellate Division nor to any Justice thereof.

(5)

Jurisdiction of the Court

The jurisdiction of this Court to grant leave to appeal herein and to determine the appeal is founded upon

New York State Constitution Article 6, Section 3(b) and Section 450.90 of the Criminal Procedure Law.

Applicant respectfully submits that the proposed appeal involves issues of law which ought to be reviewed by this Court.

POINT I: THE PRINCIPLES OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL AND/OR RES JUDICATA BARRED PROSECUTION OF THE SUBJECT INDICTMENT

Applicant contends that he was in fact twice prosecuted for the same offense, that is, once in the probation violation prosecution and again under the indictment which underlies this application. There can be no doubt that the parties were the same in both proceedings and that both proceedings took place in a criminal court as opposed to situations which have been the subject of some decisions of this Court where one proceeding took place or was proposed to take place in a criminal court and the other proceeding took place or was proposed to take place in something other than a criminal court, such as an executive department of the State, such as the Division of Parole or the Department of Motor Vehicles.

At pages 7 - 21 of Appellant's Brief, presented herewith (see also pp. 1-7 of Appellant's Reply Brief presented herewith), applicant has set out what

applicant views as the applicable federal constitutional and State constitutional provisions, State statutory provisions, and precedents of this and other courts.

The Appellate Division has found (p. 2 of its decision presented herewith) that the constitutional double jeopardy protections of the federal and state constitutions are not applicable to the instant

FILED
DEC 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-797

IN THE

Supreme Court of the United States

October Term, 1987

MARK POLLAK,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Reply to Petition for a Writ of Certiorari

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Respondent.

Petition for Writ of Certiorari to the
New York State Court of Appeals

REPLY TO PETITION FOR A WRIT OF
CERTIORARI.

ARGUMENT IN SUPPORT OF DENIAL OF CERTIORARI.

Petitioner does not dispute the fact that he appeared before the County Court on November 2, 1984 as a probationer. As a probationer, he was in the legal custody of the court and therefore, under its supervision and control (N.Y. Crim. Proc., Section 410.50[1]). The law is well settled that one's status as a probationer places certain limits on his constitutional rights (*Morissey v. Brewer*, 408 U.S. 471, 489 [1972], and *Gagnon v. Scarpelli*, 411 U.S. 778, 781). Furthermore, probation revocation does not constitute a stage of a criminal prosecution (*Gagnon*, at 782).

Petitioner cites *Breed v. Jones*, 421

U.S. 519, to support his position that a probation revocation hearing followed by a criminal trial constitutes double jeopardy. It is the People's position that *Breed* can be distinguished from the instant case.

Breed deals with a situation in which a juvenile was first detained under the juvenile code and later convicted as an adult of the identical crime. In the instant case, the Petitioner was found to have violated a condition of his probation from an earlier Assault conviction, to wit: that the defendant not violate any federal, state or local law. Petitioner was subsequently convicted of the new criminal offenses, to wit: Criminal Sale of a Controlled Substance.

The sentence handed down by the Court for the probation violation re-

lated back to the original Assault charge. The Petitioner was not entitled to the "higher degree of protection" afforded to the juvenile in *Breed*. Cf. *Gagnon*, footnote 12, 789.

A probationer faces a dilemma when charged with a new crime. For example, he must choose between his right to testify at the violation hearing and his right to remain silent. It is, however, a dilemma based upon an established criminal record.

In addition, a probation violation hearing can be utilized by the defendant as a means of discovery, insofar as the People are obligated to produce at least part of their evidence from the upcoming trial. Furthermore, if the probationer so elects, he may move to adjourn that hearing until after the trial. In the

instant case, no such motion was made.

Lastly, the purpose of a sentence of probation is to allow eligible defendants an alternative to jail. If the theory of this defendant is followed to its logical conclusion, then the People must prosecute either the new crime or the probation violation. If such was the case, given the uncertainty of predicting future criminal behavior, the probation alternative would become extinct.

Respectfully submitted,

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